Supreme Court, U.S.
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No. 04-1039

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2005

RANDALL INDUSTRIES, INC. AND
RANDALL RENTS OF INDIANA,

Petitioners,

v.

CHRISTOPHER PEASE, VINCE VITI,
WILLARD BERGE and MIKE GEAR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY FOR PETITIONERS

I. THE RESPONDENTS' BRIEF IMPROPERLY ALLEGES THAT PETITIONERS DID NOT IDENTIFY A COMPELLING REASON FOR REVIEW

The Respondents argue that Petitioners did not present a compelling reason for review of the Seventh Circuit's denial of their Federal Rule of Appellate Procedure Rule 38 Motion. (Br. in Opp. 3-4). Respondents acknowledge that there is a split in the circuits as to the time limits for filing a Rule 38 Motion, but argue that this is not an issue requiring national uniformity. (Br. In Opp. 3-4). Ironically, the only support Respondents offer for their argument is a Supreme Court case which addressed the need for a uniform statute of limitations for vacating an arbitration award. (Br. in Opp. 4) (*citing DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 171 (1983)). If anything, this Court's analysis in *DelCostello*, which sought to define a uniform deadline for filing motions to vacate arbitration decisions, actually supports the Petitioners

position that the split in the circuits regarding whether a Rule 38 Motion must be filed before or after a decision on the merits is an important issue and need for uniformity among the circuits creates a compelling reasons for review of the Seventh Circuit's denial of the Petitioners' Rule 38 Motion.

More importantly, the Respondents ignore Petitioners' argument that review of the Seventh Circuit's decision is necessary to cure the deprivation of Petitioners' Fifth Amendment Due Process rights. The Seventh Circuit denied Petitioners' Rule 38 Motion as untimely without prior notice as to when a motion for sanctions must be filed - either by Circuit Rule or published decision. Depriving Petitioners of their statutorily created right to recover damages for defending against a frivolous appeal clearly constituted a violation of their Fifth Amendment right to Due Process. *See Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir., 2000) (depriving an individual of a property interest without notice and an opportunity to be heard violates procedural due process). The violation of an individual's Constitutional

rights is certainly a compelling reason for this Court to review a circuit court decision.

II. THE RESPONDENTS' MISREPRESENTATION OF SEVENTH CIRCUIT PRECEDENTS CONSTITUTES AN IMPROPER ATTEMPT TO MISLEAD THIS COURT

Respondents' have misstated the holdings of Seventh Circuit decisions and used United States District Court decisions analyzing Rule 11 of the Federal Rule of Civil Procedure in an inappropriate attempt to convince this Court that a clear standard as to the timing for Rule 38 Motions has been articulated in the Seventh Circuit.

Petitioners allege:

> The Seventh Circuit has clearly held that parties must file Rule 38 motions within a "reasonable period," which is defined as prior to the Court's substantive ruling on the merits of an appeal. *See Hernandez v. Joliet Police Department*, 197 F.3d 256, 265 (7th Cir. 1999) (court recognized appropriateness of submitting Rule 38 motion for sanctions just after submitting appellate briefs).

(Br. in Opp. 7). In *Hernandez*, however, the only discussion of the timing for a Rule 38 motion was the factual recitation that the parties had both moved for damages and costs after

their briefs were submitted. *Hernandez v. Joliet Police Dept.*, 197 F.3d 256, 265 (7th Cir. 1999). The Seventh Circuit engaged in no other discussion as to the time for filing such motions or made any reference to the appropriateness of when a Rule 38 motion should be filed. *Id.* (denying both parties motions for Rule 38 sanctions). This case in no way supports the Respondents' argument that the Seventh Circuit has "clearly held" that parties must file their Rule 38 motions prior to a decision on the merits.

Along with misstating the facts and discussions in *Hernandez*, the Respondents use a decision from the United States District Court for the Northern District of Illinois relating to Rule 11 to argue the Seventh Circuit has adopted a clear time limit for Rule 38 motions. (Br. in Opp. 8) (*citing Northlake Marketing and Supply, Inc. v. Glaverbel*, 194 F.R.D. 633, 635 (N.D. Ill. 2000). Notably, Respondents fail to mention that this *Northlake* dealt with Fed. R. Civ. P. Rule 11 as opposed to Fed. R. App. P. Rule 38. *Id.*

More importantly, *Northlake* did not hold that it is improper to bring a Rule 11 motion after a judgment. Rather, it merely indicated that bringing a motion for sanctions under Rule 11 more than nine months after the judgment was untimely. *Id.* In fact, as Local Rule 54.3 of the Northern District of Illinois states, a motion for attorney's fees under Rule 11 may be filed within 90 days after the entry of the judgment or settlement agreement on which the motion is founded. N.D. Ill. LR 54.3.[1]

Indeed, the only decision accurately cited by the Respondents, although inapplicable here because it too involved Rule 11, stated that requests for attorney's fees should be filed within 90 days *after* final judgment. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1079-80 (7th Cir. 1987).

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[1] The existence of this Local Rule in the Northern District of Illinois stands in stark contrast to the present state of affairs involving Rule 38 in the Seventh Circuit – both in terms of permitting a motion after judgment and more simply in providing guidance as to the timeline for filing such rules.

In light of these precedents, which are bare of any analysis of a time limit for Rule 38 motions, Respondents conclude that "minimal research reveals the Seventh Circuit's requirement that a litigant file a motion for sanctions prior to the Court's ultimate ruling on the merits of the appeal." (Br. in Opp. 9) (*citing Hernandez*, 197 F.3d at 265). As a remedial reading of the cases cited by Respondents shows, their argument is more than a mere stretch of the imagination and, in fact, can only be seen as a deliberate misrepresentation of Seventh Circuit precedents in an attempt to mislead this Court.

CONCLUSION

The arguments raised by Respondents in their opposition brief are clear misrepresentations of the facts and underlying precedents. Their brief is compelling evidence as to the reasons Petitioners' petition should be heard.

Without prior notice, the Seventh Circuit adopted the minority view of the split among the circuit courts regarding when a Rule 38 motion must be filed and thereby deprived

Petitioners of their statutory right to recover costs and fees under Rule 38 without due process.

For the foregoing reasons, this Court should grant the Petition for Certiorari, summarily vacate the Seventh Circuit's Decision and Order declaring Petitioners' Rule 38 Motion untimely and declare a uniform time limit for filing Rule 38 motions after a decision on appeal.

Respectfully submitted,

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